

§ 230.166

and §§ 240.14c-1 through 240.14c-101 of this chapter).

(d) *Applicability.* This section is applicable not only to the offeror of securities in a business combination transaction, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction.

(e) *Failure to file or delay in filing.* An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) or (c) of the Act (15 U.S.C. 77e(b)(1) and (c)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) *Definitions.*

(1) A *business combination transaction* means any transaction specified in § 230.145(a) or exchange offer;

(2) A *participant* is any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf; and

(3) *Public announcement* is any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction.

[64 FR 61450, Nov. 10, 1999]

§ 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.

PRELIMINARY NOTE: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications.* In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the

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Act (15 U.S.C. 77e(c)), so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.

(b) *Definitions.* The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

[64 FR 61450, Nov. 10, 1999]

§ 230.170 Prohibition of use of certain financial statements.

Financial statements which purport to give effect to the receipt and application of any part of the proceeds from the sale of securities for cash shall not be used unless such securities are to be offered through underwriters and the underwriting arrangements are such that the underwriters are or will be committed to take and pay for all of the securities, if any are taken, prior to or within a reasonable time after the commencement of the public offering, or if the securities are not so taken to refund to all subscribers the full amount of all subscription payments made for the securities. The caption of any such financial statement shall clearly set forth the assumptions upon which such statement is based. The caption shall be in type at least as large as that used generally in the body of the statement.

[21 FR 7566, Oct. 3, 1956]

§ 230.171 Disclosure detrimental to the national defense or foreign policy.

(a) Any requirement to the contrary notwithstanding, no registration statement, prospectus, or other document filed with the Commission or used in connection with the offering or sale of any securities shall contain any document or information which, pursuant to Executive order, has been classified by an appropriate department or agency of the United States for protection in the interests of national defense or foreign policy.

(b) Where a document or information is omitted pursuant to paragraph (a) of this section, there shall be filed, in lieu